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90-80

No.

Supreme Court, U.S.
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CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD M. PENTA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

WILLIE J. DAVIS*
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QUESTIONS PRESENTED

I. Whether uncounseled statements made by a putative defendant to a prosecuting attorney are inadmissible under Federal Rule of Criminal Procedure 11(e)(6) which bars the use of statements made during plea discussions where the prosecuting attorney testifies that the statements were made in relation to the government's sentencing recommendation.

II. Whether witnesses who are in the custody of the United States Marshal and whose whereabouts are known to the government are "unavailable" within the meaning of 18 U.S.C. §3161 and therefore qualify the time spent transporting them for trial as excludable delay under the Speedy Trial Act.

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NO.

IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

RICHARD M. PENTA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals. United States v. Richard M. Penta, is reported at 898 F.2d 815 (1st Cir. 1990). (App. A). The opinions of the District Court regarding the admissibility of the defendant's statements is not reported (No. 88-0038-F [D.C. Mass. 1989]). (App.

B). The decision of the District Court regarding the defendant's motion to dismiss for lack of a speedy trial is not reported (No. 88-0058-S [D.C. Mass. 1989]). (App. C). The decision of the Court of Appeals denying rehearing is reprinted in Appendix D.

JURISDICTION

The decision below was issued on March 16, 1990. A petition for rehearing was denied on April 11, 1990. A petition for Writ of Certiorari was filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is claimed under 28 U.S.C. §1254(1).

STATUTES AND RULES

I. Federal Rule of Criminal Procedure 11(e)(As Amended)

e. Plea Agreement Procedure.

1. In General.

The attorney for the government and the

attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or,

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

2. Notice of Such Agreement. If a plea agreement has been reached by the parties the court shall, on the record, require the disclosure of the agreement, in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

3. Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the

disposition provided for in the plea agreement.

4. Rejection of a Plea Agreement.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

5. Time of Plea Agreement Procedure.

Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

6. Inadmissibility of Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) A plea of guilty which was later withdrawn·

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any

proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

f. Determining Accuracy of Plea.
Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

g. Record of Proceedings.
A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea

agreement, and the inquiry into the accuracy of a guilty plea.

h. Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. be

II. Federal Rule of Evidence 410.

Except as otherwise provided in this rule, evidence of the following is not,in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding

either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceedings wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

III. 18 U.S.C. §3161(h)(2).

(2) Any period of delay during which prosecution is deferred by the

attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever

his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

STATEMENT OF THE CASE

On February 17, 1988, a federal grand jury sitting in Springfield, Massachusetts, returned a ninety-eight count indictment numbered 88-0038-F charging that Richard M. Penta and five others participated in a scheme to alter the odometers of used automobiles.

In short, the defendant was charged with his involvement in Titles for nine used automobiles with altered odometers and conspiracy. For each automobile, there were three counts in the indictment - one for transporting a falsely made title to New Jersey, in violation of 18

U.S.C. 2314; one for transporting a falsely made New Jersey title to the buyer of the automobile, in violation of 18 U.S.C. 2314; and one for resetting the odometer, in violation of 15 U.S.C. 1984, 1990(c). In addition, Count I charged the defendant with conspiracy.

The defendant was arraigned on March 8, 1988. On July 1, 1988, Motions to Suppress Statements and Dismiss were filed on his behalf. Hearing was held on these motions on October 3, 1988 before Ponsor, U.S.M. On November 16, 1988 the Magistrate recommended that the defendant's motions be denied. The defendant filed a timely objection to the Magistrate's Report and Recommendation. On February 9, 1989, the District Court (Freedman, C.J.) issued a Memorandum and

Order adopting the report and recommendation of the Magistrate and denying the Motions to Suppress and Dismiss.

On April 20, 1989, the case was transferred from Springfield to Boston for trial. The defendant filed a Motion To Dismiss for lack of a speedy trial. That motion was denied on June 7, 1989. (Skinner, J.). (See App. C). On July 6, 1989, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, the defendant entered a conditional plea of guilty, preserving his right to appeal the adverse rulings of the District Court in regard to his Motions to Suppress and Dismiss. (App.10). On September 5, 1989, he was sentenced to three years in the custody of the United States Marshal on

Count 1; sentencing on Counts 10-35, suspended; on Counts 36 & 37 the defendant received a term of probation for a period of two years commencing upon completion of sentence imposed on Count 1. A fine of $50,000 on each of Counts 36 & 37 was imposed for a total fine of $100,000.00. His Motion For A Stay of Execution pending Appeal was allowed. (App. 217). On March 16, 1990, the First Circuit Court of Appeals affirmed the denial of the defendant's Motion To Suppress and Motion To Dimiss for Lack of a Speedy Trial. On April 11, 1990, the same Court denied rehearing.

STATEMENT OF FACTS

In March of 1985, Justice Department Attorney Don Burley suspected the defendant of participation in

title-washing schemes for motor vehicles which had altered odometers. (App.132).[1] Burley contacted the defendant at his job at the Concord Auto Auction in Acton, Massachusetts. According to Burley's testimony, between March and July of 1985, several conversations took place between Burley and the defendant. None of these conversations between the prosecutor and the defendant were recorded, none of them were witnessed by F.B.I. Agents, and none of them were memorialized in reports other

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[1] The transcript of relevant testimony from the October 3, 1988 hearing was reproduced in the Appendix to petitioner's Brief to the Court of Appeals. References to documents contained in the Appendix will be made by a notation of App., followed by the appropriate page in the Appendix. References to documents not reproduced in the Appendix will be made by reference to the title of the document and the page number of the document referred to.

than personal notes of the prosecutor. In July of 1985, prosecutor Burley arranged for a meeting between Penta and Agent Bubella of the Providence, Rhode Island Office of the F.B.I. (Exhibit 1, Hearing on Motion To Suppress). The meeting took place in the Worcester F.B.I. Office. (Exhibit 1, Hearing on Motion To Suppress). The information given by the defendant to Agent Bubella was, according to prosecutor Burley, false.

Following the July, 1985 meeting, several more conversations took place between Penta and prosecutor Burley. (App. 113, Ex. 2).

At some point, F.B.I. Agent Scripture was assigned to the case. Agent Scripture also spoke to the defendant several times - at least sixteen to twenty

- and memorialized the conversations with the defendant into 302 reports on only two occasions, April 23, 1987 and May 21, 1987.

After the July, 1985 meeting but before December 8, 1986, prosecutor Burley became aware that the defendant had not been truthful in the information that he had provided and that Penta's role was much bigger than he originally led Burley to believe. (App. 118-119). Prior to the April 23, 1987 meeting, prosecutor Burley testified that on at least two occasions, in the spring of 1987, the defendant met with Burley in Springfield, Massachusetts. (App.117). Prosecutor Burley attempted to encourage the defendant to provide more truthful information. In Burley's words, these conversations were not memorialized

because, "nothing that was -happened at those - other than we just, we approached him to try to get him to talk, he wouldn't talk." (App.121). Burley testified that both he and Agent Scripture indicated to Penta that, "at some point he should think about cooperating and telling us everything that had occurred, truthfully, candidly and completely." (App.119, 122). During these meetings, Penta asked for assurances. (App.123). According to Prosecutor Burley, before the meetings, Penta was, "trying to exact either a promise from us - obviously it was (Burley's) belief that what he was trying to do was get us to agree not to prosecute him or get us to agree that we would

recommend probation or a minimal jail sentence." (App. 124).[2]

According to Prosecutor Burley, the defendant wanted to know if he cooperated, "how this is going to be resolved" (App. 125), although Burley was not sure of the exact words used, he was sure that, "at least from (Burley's) perspective, that there would be a prosecution of him. That he would eventually plead guilty and the question that (Burley) was leaving unresolved was what we would agree to recommend at sentencing before a Judge; and that (Burley) would make no promises . . .

---

[2] Agent Scripture also testified that at this time it was quite clear to all present during the conversation that Mr. Penta would be facing some type of criminal charges and wanted to know what would happen to him. (App. 75).

until we could have a chance to listen to him, to evaluate him, to determine whether he was being candid with us, and determine the value of the information that he wanted to provide." (App.137). At and before the April 23, 1987 meeting, Burley testified that he (Burley), "certainly thought leaving the meetings that we had that there was no question and that Mr. Penta understood very well that he was going to be prosecuted." According to Burley's testimony, the nature of the discussions which induced the defendant's candor were such that, "the idea was, again that this would be resolved through plea agreement, that his cooperation would be taken into account, and that the severity of what we would recommend would be lessened." (App.147).

Following these discussions, the defendant gave statements on April 23, 1987 and again on May 21, 1987, in which he admitted that John Miller was working for him, that the defendant had a rubber stamp made that contained a signature of John Miller, and several other incriminating statements, as well as detailed information concerning the activities of other individuals. The defendant was not represented by counsel at any of these meetings. Nor was he given Miranda warnings.

The defendant's Motion to Suppress the April 23, 1987 and May 21, 1987 statements on the grounds that they were obtained during plea discussions and that they were involuntary was denied on February 9, 1989.

On April 20, 1989, the case was ordered transferred to Boston for trial. On May 8, 1989, the government moved for a continuance under 18 U.S.C. §3161(h)(8) to and including August 5, 1989.

The defendant opposed the continuance. The case was set for trial and the District Court noted that the government would be allowed three weeks lead time because some of its witnesses were in prison and unavailable. The District Court held that the the three-week time period sought by government was excludable delay under 18 U.S.C. 3161(h)(2) and denied the defendant's Motion to Dismiss for lack of a speedy trial.

The First Circuit held that the District Court had cited the wrong

subsection, and that the exclusion was proper under §3161(h)(3) as witnesses who are in prison are unavailable within the meaning of 18 U.S.C. §3161(h)(3).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN EXPRESS CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AS TO THE APPLICATION OF RULE 11(e)(6) TO PLEA DISCUSSIONS BETWEEN A DEFENDANT AND A PROSECUTING ATTORNEY.

In holding that the discussions between petitioner and the prosecutor were not inadmissible under Rule 11(e)(6), the Court below stated:

> To the extent that United States v. Serna, 799 F.2d 842, 849 (2d Cir. 1986), cert. denied, 481 U.S. 1013 (1987) indicates that a "preliminary discussion must be considered as part of the overall plea bargaining process," we do not agree. We believe the rule was amended because of the realization that not only was there no need to go beyond a finite interpretation, but that

> once one did, there was no legitimate place to stop.

United States v. Penta, 898 F.2d 815 at 819 (1st Cir. 1990).

In Serna, supra., the Second Circuit held that statements made to a DEA Agent were not admissible pursuant to Rule 11(e)(6), even though the prosecuting attorney was not present when the statements were made, and the agents abandoned plea discussions when the defendant provided what they felt to be less than candid responses. The Court held that statements made to agents with authorization to determine whether Serna would cooperate were within the proscription of the Rule.

The Eighth Circuit has also held that preliminary statements which are made to

law enforcement agents with authorization to plea bargain, although preliminary, are inadmissible under Rule 11(e)(6)(D). United States v. Grant, 622 F.2d 308 (8th Cir. 1980); United States v. Jorgensen, 871 F.2d 728 (8th Cir. 1989).

The decision below leaves uncertainty as to whether discussions between a prosecuting attorney and a defendant which are undertaken by both sides "with a view toward" reaching a plea agreement are later admissible at trial if no accord is ultimately reached. Clearly, in the Eighth and Second Circuits, such discussions would not be later admissible, as long as the discussions took place with a government representative who had authority to bargain. However, in the First Circuit, unless the discussions

culminate in a specific agreement, the statements can be used as evidence.

It is submitted that certiorari is appropriate in order for this Court to resolve the conflict in the Circuits created by the decision below, as the uncertainty created by the conflict in the application of Rule 11(e)(6) will undoubtedly effect the process of plea bargaining - a process which this Court has recognized to be essential to the functioning of the criminal justice system. Santobello v. New York, 404 U.S. 257 (1971); Blackledge v. Allison, 431 U.S. 63 (1977).

Moreover, the decision below is in conflict with the clear legislative intent expressed when Rule 11 was amended in

1980. Prior to amendment, in relevant part, the Rule read that:

> (6) . . . statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

Fed. R. Crim. Pro. 11(e)(6), Dec. 26, 1944, eff. March 21, 1946, as amended February 28, 1966, eff. July 1, 1966; April 22, 1974, eff. December 1, 1975; Act July 31, 1975, P.L. 94-64 §§ 2, 3(5)L-(10), 89 Stat. 370-371 eff. August 1, 1975 and December 1, 1975.

Effective December 1, 1980, the rule was amended to read:

> (e)(6) Inadmissibility of pleas, plea discussions, and related statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding,

> admissible against the defendant who made the plea or was a participant in the plea discussions.
>
> . . .
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

(Amended effective August 1, 1979; effective December 1, 1980, as provided by Act July 31, 1979, P.L. 96-42, §1(1), 93 Stat. 326; effective August 1, 1982; August 1, 1983; August 1, 1985; August 1, 1987; November 18, 1988, P.L. 100-690, Title VII, Subtitle B, §7076, 102 Stat. 4406).

Hence, the drafters of the amendment inserted wording which specifically provided that plea discussions with

government attorneys were what the rule seeks to exclude. The holding below indicates that the discussions at issue were "preliminary," and therefor not contemplated as within the scope of the amended rule. This is not so:

> . . . Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment insures that even an attempt to open up plea bargaining is covered under the same rule of inadmissibility.

Advisory Committee's Note to 1979 Amendments to Rule 11(e)(6) citing United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976).

It is submitted that the conflict in the application of Rule 11(e)(6) created by the decision below renders review appropriate for this Court, and that upon

review, the decision below should be reversed.

II. THE DECISION BELOW, HOLDING THAT WITNESSES WHO ARE IN PRISON ARE "UNAVAILABLE" FOR PURPOSES OF EXCLUSION OF TIME FROM THE REQUIREMENTS OF THE SPEEDY TRIAL ACT (18 U.S.C. §3161) IS IN CONFLICT WITH THE HOLDINGS OF THE NINTH CIRCUIT.

The petitioner was arraigned on Indictment Number 88-0038-F in March of 1988. All outstanding motions were decided by April 12, 1989. On April 20, 1989, the case was ordered transferred to Boston for trial. On May 8, 1989 the government moved for a continuance under 18 U.S.C. §3161(h)(8) to and including August 5, 1989.

The petitioner opposed the continuance, and moved to dismiss the indictment under 18 U.S.C. §3161 et. seq. (Speedy Trial Act). On June 7, 1989, the District Court denied the Motion to

Dismiss. In so doing, the District Court excluded a three-week period of delay from its calculation under the Speedy Trial Act because:

> The government has moved to continue this case until August 5, 1989 on the ground that it is complex. The government has had well over a year to master its complexities. The government legitimately seeks three weeks of lead time because some of its witnesses are in prison and unavailable . . . the time between now and then is excludable under 18 U.S.C. 3161(h)(2).

(App. C).

On appeal, the defendant argued that the subsection relied upon by the District Court requires a written agreement with the defendant, and therefor, as none existed, exclusion of the three-week time

period was not proper. The First Circuit Court of Appeals held that:

> [W]here the government showed that the second claimed[3] period was, "due to the absence or unavailability of . . . an essential witness" within the meaning §3161 (h)(3), the court's citing the wrong subsection in so finding was a more clerical mistake, and this exclusion was proper.

United States v. Penta, 898 F.2d 815 at 819 (1st Cir. 1990).

It is submitted that this holding is in conflict with the ruling of the Ninth Circuit, as well as relevant statutory provisions.

---

[3] The "first period" at issue on appeal was the nineteen-day period taken up by the intradistrict transfer. The Court of Appeals agreed with the petitioner that this period was not excludable. From that ruling, petitioner does not seek certiorari.

Specifically, §3161(h)(3)(B) provides:

> For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown, and, in addition, he is attempting to avoid apprehension or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

It is submitted that witnesses who are in prison are not "absent" within the meaning of the statute, as their whereabouts are known. Moreover, witnesses who are in prison are not "unavailable" as their presence can be obtained by due diligence.

In United States v. Taylor, 721 F.2d 1377 (9th Cir. 1987), the Court held that a delay of fifteen days during which the defendant was held by the United States Marshal Service in California were not excludable under 18 U.S.C. §3161(h)(3). The Court of Appeals said:

> During the two disputed periods, totalling fifteen days, Taylor was not "unavailable"; he was in the custody of the United States Marshal Service and within the full control of the federal government . . . .

United States v. Taylor, supra. 721 F.2d 1377 at 1385.

Having found that the Act had been violated, the Court went on to uphold dismissal with prejudice.

This Court granted certiorari and reversed the Ninth Circuit's holding

only insofar as that Court had held that dismissal should be with prejudice. United States v. Taylor, 427 U.S. 326 (1988). This Court's opinion specifically left in tact the holding that the Speedy Trial Act had been violated, and dismissal warranted.

Clearly, the decision below that incarcerated witnesses are "unavailable" or "absent" within the meaning of 18 U.S.C. §3161(h)(3) is in conflict with the decision of the Ninth Circuit in Taylor, supra. In addition, the issue presented is one which will present itself often in criminal trials and uniform application of the Speedy Trial Act is of paramount importance to the criminal justice system. It is submitted that this Court's review of the issue is necessary and appropriate.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that certiorari be granted and the case set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 89-1919

UNITED STATES OF AMERICA,
Appellee,

v.

RICHARD M. PENTA,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner,
United States District Judge]

Before

Breyer, Aldrich and Cyr,
Circuit Judges.

Frances L. Robinson with whom Davis & Robinson was on brief for appellant.

Scott R. McIntosh, Appellate Staff, Civil Division, Department of Justice,

with whom Stuart M. Gerson, Assistant Attorney General, and Douglas N. Letter, Appellate Staff, Civil Division, Department of Justice, were on brief for appellee.

March 16, 1990

ALDRICH, Senior Circuit Judge.

This case raises, in sharp focus, the breadth of meaning of "discussions" as used in Fed. R. Crim. P. 11(e), that holds inadmissible in evidence statements made to a United States Attorney by a defendant, including before indictment, in certain circumstances.

> (e) Plea Agreement Procedure.
>
> (1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of

guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

. . .

(6) Inadmissibility of Pleas, Offers, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty or nolo contendere to the crime

> charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. (Emphasis, except in titles, supplied).

Effective December 1, 1980, for subparagraphs (6) there was substituted the following,

> (6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceedings, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (A) a plea of guilty which was later withdrawn;
>
> (B) a plea of nolo contendere;
>
> (C) any statement made in the course of

> any proceedings under this rule regarding either of the foregoing pleas; or.
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. (Emphasis, except in title, supplied).

The question is whether this rule excludes statements made by a defendant (one not yet indicted, but who fell within the rule's compass) to a United States Attorney, and an investigator, with whom he had a number of conferences, during which time the attorney was openly trying to build a case against defendant's associates, and, in the attorney's unexpressed belief, defendant felt, or at

least feared, that he, too, would be indicted, and "was trying to get us to agree not to prosecute him, or get us to agree that we would recommend probation or a minimum jail sentence," but defendant made no such request, and the attorney made no offer. The relevant conversation was as follows.

The attorney told defendant it would be in his best interests to tell candidly and completely. Defendant asked if he cooperated, and gave documentation, "What is going to happen to me?" "My response was along the lines I'm not going to promise you anything. I can't tell you how we're going to resolve this thing. The ball is in your court one hundred percent . . . . He kept wanting to know what would happen to him."

Q. And your statement to him?

A. No promise would be made. It was solely his decision, voluntary, one hundred percent on his part.

Q. And that would be evaluated at sentencing?

A. In what we would agree to -- the idea was, again, that this would be resolved through plea agreement; that his cooperation would be taken into account, and that what we would recommend would be lessened.

Defendant did not testify. The ambiguity (or possible error in transcription) of the last answer, was not pursued. Obviously "would be resolved through plea agreement," was not correctly put. It was not responsive to anything said before, and, at most, must have meant, "could," or "would, if there were

such." just as the final clause meant, "would be lessened if there were such."

We hold this was not a plea discussion within the rule, and that, there being no other obstacles, the court did not err in admitting the conversations.

Courts have long recognized that plea bargaining is essential to the functioning of the criminal justice system. "Properly administered." the Supreme Court has stated, "it is to be encouraged," Santobello v. New York, 404 U.S. 257, 260 (1971), "and can benefit all concerned." Blackledge v. Allison, 431 U.S. 63, 71 (1977). Some of the benefits include:

> The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the

> chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce recources.

Id. But "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor." Santobello, 404 U.S. at 261. Rule 11 is designed to ensure the fairness of the plea bargaining process and to encourage frank plea discussion between the parties. Rachlin v. United States, 723 F.2d 1373, 1376 (8th Cir. 1983), but, we believe, discussions means plea discussions, and not simply anything that might ultimately lead to such.

Before the 1979 amendment, Rule 11(e)J(6) made inadmissible any "statements made in connection with, and relevant to" a plea or offer to plea.

This language led to decisions such as United States v. Herman, 544 F.2d 791 (5th Cir. 1977), where the defendant made an offer to plead guilty to lesser charges in exchange for dropping the murder charge to Postal Inspectors who had no official negotiating authority for the government. Finding that the defendant "made the statements during the course of a conversation in which he sought concessions from the government in turn for a guilty plea," id. at 798, the court determined that Rule 11(e)J(6) required no more. If the defendant or putative defendant believed he was engaged in plea negotiations, his statements were inadmissible at trial.

Not every court read Rule 11(e)(6) so expansively, and the Fifth Circuit soon

abandoned Herman's entirely subjective test. In United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir. 1978), the court identified the problem -- "Plea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation" -- and formulated a two-part objective test for admissibility:

> The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

Id. at 1366. Robertson's two-tiered approach has been adopted in several circuits. See, e.g., United States

v. Grant, 622 F.2d 308, 312 (8th Cir. 1980); United States v. O'Brien, 618 F.2d 1234, 1240-41 (7th Cir.), cert. denied, 449 U.S. 858 (1980); United States v. Pantohan, 602 F.2d 855, 857 (9th Cir. 1979). But cf. United States v. Sikora, 635 F.2d 1175, 1175-76 (6th Cir.), cert. denied, 449 U.S. 993 (1980)(more complex approach).

When Congress amended Rule 11(e)(6) in 1979, it had a body of experience to draw on in redrafting the inadmissibility language. As the Advisory Committee notes make clear, it rejected Herman's subjective interpretation:

> The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and

> intended to be protected by subdivision (e)(6) of the rule.

The pre-amendment language could incorrectly be interpreted to make "an otherwise voluntary admission to law enforcement officials inadmissible merely because it was made in the hope of obtaining leniency by a plea." The amendment was intended to narrow the scope of the rule and "identif[y] with more precision than the present language the necessary relationship between the statements and the plea or discussion." Fed. R. Crim. P. 11(e)(6) Advisory Committee note, 1979 Amendment.

While the amended rule rejects Herman, it embraces neither Robertson's two-tiered test nor Sikora's multi-factored approach. Most

courts have simply applied the plain language of the rule to the facts before them and have had little difficulty identifying the demarcation line between admissible and inadmissible statements. Thus in United States v. Jorgensen, 871 F.2d 725, 730 (8th Cir. 1989), the court said there was no plea bargaining when defendant thought "the surest means of limiting his punishment was to speak candidly [and there was] no evidence that the officers made direct or implied promises other than to inform other law enforcement authorities of Jorgensen's cooperation." In United States v. Porter, 821 F.2d 968, 976-77 (4th Cir. 1987), cert. denied, 485 U.S. 934 (1988), the court said that where the officer explicitly said he had no

authority to make a deal, defendant's making "statements as an informant, hopeful of getting a break," was not within the rule. See also, United States v. Sebetich, 776 F.2d 412, 421 (3d Cir. 1985), cert. denied, 484 U.S. 1017 (1988).

In other words, plea discussions means plea discussions. To the extent that United States v. Serna, 799 F.2d 842, 849 (2d Cir. 1986), cert.denied, 481 U.S. 1013 (1987), indicates that a "preliminary discussion must be considered as part of the overall plea bargaining process," we do not agree. We believe the rule was amended because of the realization that not only was there no need to go beyond a finite interpretation, but that once one

did, there was no legitimate place to stop.[1] Defendant has no valid claim.

Defendant's other points have been considered, but only one calls for comment. If the court's excluding both of two periods from the 70 maximum number of days permitted by the Speedy Trial Act, 18 U.S.C. §3161, was error, the prosecution should have been dismissed. The first of these delays was occasioned by virtue of the transfer of the case for trial from Springfield, Massachusetts, to Boston. Section 3161(h)(1)(G) permits excluding the time required for transfer from "another district." This was not such.

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[1] Presumably, it takes two to tango. We do not, however, face the possible question of whether it is a discussion when a might-be-defendant "discusses" the conditions under which he might plead in the presence of a disclaiming, and otherwise mute, audience.

We cannot accept the holding of United States v. Glasser, 773 F.2d 1553, 1557 (11th Cir. 1986), that to claim a difference between "inter-district" and "intra-district" is "overly technical;" nor the court's suggestion that a local rule could wipe out the difference -- which our's does not purport to, in any event.

On the other hand, where the government showed that the second claimed period was due to the "absence or unavailabillty of . . . an essential witness," within §3161(h)(3), the court's citing the wrong subsection in so finding was a mere clerical mistake, and this exclusion was proper.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL NO. 88-0038-F
	)	
FRANCIS A. CONNOR, JR.	)	
RONALD J. MARINO	)	
MICHAEL J. DINEEN,	)	
PAUL BLEICHERT	)	
JOHN T. WEAVER and	)	
RICHARD M. PENTA	)	

MEMORANDUM AND ORDER

February 9, 1989

FREEDMAN, C.J.

Before the Court are defendant Richard Penta's objections to a report issued by a United States magistrate regarding Penta's motion to suppress statements he made to government agents and a Justice Department prosecutor. The facts are, essentially, not in dispute. Characterizations of those facts, however, are disputed as will be seen below. The

Court referred the suppression motion to the Magistrtate who, after a hearing, found the following facts.

I. FACTS

> Some time in the first half of 1985 Justice Department attorney Don O. Burley was leading an investigation into automobile title washing and odomter rollback schemes in the northeast. In April of 1985 Burley called the defendant, who was then general manager of the Concord Auto Auction ("Concord") in Act[on], Massachusetts. There were two reasons for the phone contact: first, Burley was looking for information relating to dealers who bought and sold autos through Concord; second, Burley was interested in information regarding defendant's own possible title washing activities in New Jersey, or his direct knowledge of any such title washing activities.
>
> When Burley first called he spoke to Concord's owner, Betsy Cox Powell, who passed him on to the defendant. After the initial contact, Burley had an unspecified number of other telephone contacts with the defendant, leading to a meeting

on July 18, 1985 at the F.B.I. office in Worcester.

Defendant contends that during the conversations he had with Burley prior to the July 18, 1985 meeting, Burley stated to him that any information he could provide would not be used against him. Burley testified to the contrary, indicating, first, that he did have some suspicion of defendant's title washing activities, although he was not sure on this point. He testified that defendant asked for promises and assurances that he would not be prosecuted, and that the documents he was providing and other evidence he was giving would not be used against him, but that Burley affirmatively refused to provide any such assurances or make any such promises. The court finds the live testimony of Burley to be more credible than the cursory reference to the contrary in defendant's affidavit. Given the fluidity of the investigation in 1985, it makes no sense that Burley would feel obliged to provide defendant with the solid assurances he now claims. More importantly, if Burley did intend to give such assurances, he would not do it as casually as defendant alleges -- that is, he would not convey a no-prosecution promise in a telephone call with no subsequent written memorialization. The court finds

it significant that no written memoranda even referred to any understanding between defendant and Burley.

The July 18, 1985 meeting at the Worcester office of the F.B.I. was attended by defendant, Burley and F.B.I. Agent Bubela. Both Bubela and Burley testified convincingly that no promises were made before or during this meeting with regard to use of any information disclosed by defendant. The discussion centered on title washing activities out of New Jersey. When defendant made statements indicating his knowledge of and, to some extent, participation in title washing activities, Bubela immediately cautioned him that any incriminating statements made by him could, in fact, be used against him. Defendant affirmatively responded that he understood this but still wished to proceed with the conversation. He never expressed any disinclination to speak, any desire to break off the talks, any wish to consult with counsel or any substantial discomfort with approach being made to him by Bubela and Burley.

Between July, 1985 and January of 1987 defendant continued voluntarily to provide documents and information on odometer rollbacks. He had contacts both

with Burley and with F.B.I. Agent James E. Scripture, Jr. The court does not accept defendant's allegation that he was told "if I were to supply more specific information that I would not be implicated." Defendant's Affidavit at 7.

In rejecting this claim, the court is relying not only upon the contrary testimony of both Burley and Scripture, but on the inherent unlikeliness that such a serious undertaking would be made by the Government orally and at a stage when the investigation was still fluid. In other words, the claim is not only contradicted, it is inherently dubious.

Defendant met again with Burley and Scripture on April 23 and May 21, 1987. At the first of these meetings, defendant pressed Attorney Burley for promises that he would not be prosecuted and that the information he was giving would not be used against him. The court credits the testimony of Burley and Scripture to the effect that, in response, Burley explicitly told defendant that no promises were being made to him, that all his statements would have to be voluntary and that, at most, the fact of his cooperation would be communicated to the court as part

of the Government's recommendation when and if defendant were prosecuted. By this time, defendant was clearly aware of the strong possibility that he would, in fact, be prosecuted. The Government's unwillingness to offer any promises to defendant, despite his desire for them, was repeated again at the May 21, 1987 meeting. Nevertheless, defendant continued to provide information with regard to title washing activities throughout this period. Significantly, none of the statements prepared from the discussions with defendant contained any reference to any promises.

The series of discussions between defendant and various agents of the Government reveals other notable facts. First, it is true that the Government had its eye on defendant as a potential object of prosecution and sought, in addition to general information with regard to title washing, information which might tend to incriminate the defendant himself. Second, agent Scripture did, during the course of a 1986 telephone conversation--a transcript of which was submitted into evidence--indicate that he would conceal the defendant's cooperation with the Government from others implicated in the title washing scheme. Third, Scripture testified, in response to a hypothetical question, that, since he was not

privy to every single conversation between Attorney Burley and defendant, it was hypothetically possible that Burley, in one of these unheard conversations, may have said something which triggered in defendant's mind a subjective expectation either that he would not be prosecuted or that the evidence he was giving would not be used against him. Finally, it is noteworthy that, after 1985, the Government agents and the Justice Department attorney became convinced that the preliminary information provided by the defendant was not only incomplete but was deliberately false and misleading. In the 1987 meetings, defendant was informed of this opinion and told that it would be in defendant's best interest to cooperate and reveal the whole truth. This urging, however, was always coupled with the clear statement that defendant's cooperation would have to be voluntary, with no promises except that his cooperation would be conveyed to the court, if appropriate. At one point in the conversation, defendant attempted to lever a promise from the Government by referring to helpful documents in his possession which he might or might not be willing to produce voluntarily, depending upon the Government's willingness to offer some firm undertaking of non-prosecution. In response to this, Burley stated emphatically

> that he would give defendant no promises and that defendant should turn over the documents. In his own mind--though not expressed to defendant--the Government attorney felt that, even if defendant refused to produce the documents voluntarily, he might obtain access to them by use of a grand jury subpoena. Contrary to defendant's suggestion, however, the determination regarding the subpoena was not communicated to defendant.

November 16, 1988 Report and Recommendation at 3-7.

In his objections, defendant waives his argument that Burley and Scripture promised him that nothing he said during their meetings would be used against him. The Magistrate expressly found to the contrary and Penta does not now object to that ruling.

II. OBJECTIONS

Defendant's first objection is that incriminating statements he made to Burley

and Scripture on March 23, 1987 and May 30, 1987 (hereinafter"the 1987 meetings") were made during the course of plea bargain negotiations and, therefore, must be suppressed pursuant to Fed. R. Crim. P. 11(e)(6). The government disagrees, maintaining that the above-mentioned discussions were not for the purpose of plea bargaining. Rather, according to the government, Burley and Scripture desired to meet with Penta in 1987 to question him regarding statements he had previously made which they felt, after further investigation, were misleading and inaccurate. Thus, in the government's eyes, no plea bargaining was occurring and, indeed, was expressly disavowed during their 1987 meetings.

In its entirety, Rule 11(e)(6)(D) reads:

> (6) Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea disucssions;
>
> . . .
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty later withdrawn.

The disputed issue in this case is whether the 1987 meetings should be characterized as plea discussions or purely investigatory with no binding promises. After the hearing, at which Burley and Scripture both testified, the Magistrate held that there were no plea negotiations during the 1987 meetings.

The findings listed by the Magistrate as important to this conclusion were that: (1) Penta pressed Burley for immunity before disclosing information at the 1987 meetings and Burley expressly told defendant that "no promises were being made to him, that all his statements would have to be voluntary and that, at most, the fact of his cooperation would be communicated to the court as part of the Government's recommendation when and if defendant were prosecuted;" (2) nothing in reports prepared after these meetings contained any reference to promises or a willingness to negotiate with defendant; (3) although not conclusive, the fact that these dicussions occurred well before defendant's indictment provide some evidence that no plea negotiations were

being discussed or considered at the time; and (4) Rule 11 applies only to "'fairly formal plea bargaining between the defendant's counsel and the United States Attorney after charges have been made or are about to be made.'" Rachlin v. United States, 723 F.2d 1373, 1376 (8th Cir. 1983); United States v. Arroyo-Angulo, 580 F.2d 1137, 1147-48 (2d Cir. 1978). See Magistrate's November 16, 1988 Report and Recommendation at 5-8.

The Court has reviewed relevant portions of the October 3, 1988 suppression hearing and concludes that the Magistrate was correct in holding that the incriminating statements made by Penta during the 1987 meetings were not ones "made in the course of plea discussions." The problem in this case is that Burley, a

federal prosecutor, also donned the hat of a law enforcement official. That is, federal prosecutors in most criminal cases before the court do not become involved in discussions with witnesses or defendants until after the indictment is returned or, at the earliest, during the grand jury proceedings. Here, Burley took on an investigative role more akin to a law enforcement agent in addition to his responsibilities as a prosecutor and, as a result, defendant is now able to assert that all statements made to Burley, or in his presence, were part of plea discussions. While this situation may cause courts difficulty in ascertaining whether bona fide plea discussions have occurred during an investigation, and thus subject to Fed. R. Crim. P. 11(e), it does

not necessarily mean that every conversation by a prosecutor with a witness--even a putative defendant--constitutes a plea discussion. What it does mean, however, is that the Court is forced into the position of having to conduct a suppression hearing and determine the credibility of witnesses on this issue.

To understand the Court's conclusion that the disputed statements were not made in the course of plea discussions, the context of the 1987 meetings should be reviewed. According to Burley--whose testimony was found credible by the Magistrate--he had reason to question the veracity of information provided by Penta at an earlier stage in the investigation. It was clear to Burley that Penta had

either misled or lied to him on previous occasions regarding "title washing" activities in the northeast. Burley's intention for the meetings was not to negotiate a plea, but to further his investigation by seeking truthful information from Penta. Importantly, at these 1987 meetings, Burley repeatedly told Penta that no promises were being made and that Penta should be forthcoming. Accordingly, the Court concludes that the 1987 meetings were purely investigatory and that nothing said during those meetings was made "during the course of plea discussions." See United States v. Sebetich, 776 F.2d 412, 421-22 (3rd Cir. 1985); Rachlin v. United States, 723 F.2d at 1377 n.7.

In any event, even if Penta subjectively believed that plea discussions were occurring, the Court holds that such a belief was objectively unreasonable in light of the record of the case and inferences reasonably drawn therefrom. See United States v. Leon Guerrero, 847 F.2d 1363, 1367-68 (9th Cir. 1988); United States v. Robertson, 582 F.2d 1356, 1366-71 (5th Cir. 1978).

Advisory Committee Notes relevant to amendments made to Fed. R. Crim. P. 11 provide in part:

> While this history shows the purpose of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the defendant or defendant when acting pro se," given visibility and sanction in rule 11 (e), a literal reading of the language of these two rules could reasonably lead to the conclusion

> that a broader rule of inadmissibility if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea . . . The amendment makes inadmissible statements made in "the course of any proceedings under this rule regarding" either a plea of guilty later withdrawn or a plea of nolo contendere, and also statements "made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty withdrawn." . . . It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions.

The Court believes that Burley was acting in an investigative role while questioning Penta, who had not retained counsel and was not in custody, in a situation where plea bargaining was simply

not at issue. The question thus becomes whether Penta's incriminatory statements were voluntary. A fair characterization of the 1987 meetings is that Penta--an apparently intelligent individual who has considerable experience with the criminal justice system--knew the investigation was being directed in part at him and was attempting to somehow tempt Burley into offering him favorable treatment. Burley did not take the bait. See United States v. Arroyo-Angulo, 580 F.2d at 1148. The Court concludes that rule 11 is not applicable to the present case due to the lack of plea discussions.

Moreover, nothing in the case indicates that Penta's statements were coerced or in any other way involuntarily made. At best, Penta was told that it was

in his best interest to cooperate and that his cooperation would be brought to the attention of the judge. See Rachlin v. United States, 723 F.2d at 1377-78. For these reasons, the Court rejects defendant's objections and adopts the Magistrate's Report and Recommendation on this issue.

Defendant's second argument involves a promise allegedly made by Scripture to Penta that the latter's identity would not be revealed to suspects involved in the investigation. The "promise" defendant is referring to was made during a taped telephone call on December 8, 1986 by Scripture to Penta. A transcript of this call is part of the evidence in this case. It was sealed by the Court, but has been

thoroughly reviewed for purposes of the present objections.

Based on the December 8, 1986 conversation with Agent Scripture, defendant Penta now claims that the government, through Scripture, promised not to reveal Penta's cooperation during the investigation or trial. Penta's position on this subject is absurd. Even if his statements can somehow be read as indicating that he feared having his identity revealed, and even if one can somehow infer a promise by Scripture to Penta, the transcript cannot be reasonably read as evincing a promise by Scripture to Penta not to reveal the facts of his cooperation in a subsequent trial. It is far more likely that Penta's statements during this call reflect his

fear that if he asked too many questions about title washing activities by his acquaintances, they would become suspicious and not reveal any more information to him and that Scripture did not want to jeopardize his source--Penta--who was in the unique position of being able to obtain incriminating evidence for Scripture about others' illegal title washing activities. Defendant's objection to the Magistrate's Report and Recommendation on this subject is rejected.

Defendant's third objection to the Magistrate's Report and Recommendation urges the Court to suppress defendant's 1987 incriminating statements due to numerous purported ethical violations by Attorney Burley. In his memorandum in

support of this argument, defendant Penta quotes portions of five disciplinary rules and prosecutorial standards established by the American Bar Association. Yet, after reading the full text of each of these rules and standards, the Court is convinced that none of Burley's actions violated any of the cited rules or standards. The Court feels that no detailed explanation is necessary on this issue because all of Penta's arguments on this issue are premised by a belief that the 1987 meetings were plea discussions. The Court has previously rejected this position and, therefore, overrules Penta's objections.

The Court must remark that Burley could have certainly avoided the present problem by not being personally present

during the pre-indictment investigations. He could have simply assigned agents to do all the interviewing. But, for whatever reasons, he did not. In its brief, the government refers to limited resources as a partial explanation for why Burley also acted as an investigator in this case. This may be true; however, the Court notes that cases would be far cleaner without this type of situation occurring. Indeed, disciplinary rule 5-102(a) states:

> I. If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue representation and he or a lawyer in his firm may testify in the circumstances enumerated in D.R. 5-101(B)(1) through (4).

Because Penta challenges the admissibility of the 1987 statements, Burley was forced to become a witness and another attorney had to replace him as the government's attorney for the suppression hearing phase of the case.[1]

Penta's final ground alleged in support of suppression is that Burley supposedly coerced Penta into giving him some incriminating documents by telling him that if he, Penta, did not give Burley the documents, Burley could simply subpoena them. The Magistrate rejected this claim out of hand because he

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[1] Even if Burley technically violated some ethical rule or standard, suppression would not be the appropriate remedy. The Court is convinced that any indiscretions Burley may have committed were innocently done. That is, Burley has not attempted to circumvent the defendant's rights in any intentional way.

expressly concluded that Burley's belief that he could subpoena the documents at any time was never communicated to Penta. Therefore, there was no coercion.

The Court has reviewed the relevant parts of the suppression hearing transcript and agrees with the Magistrate that there is no credible evidence that Burley ever passed his belief regarding his ability to subpoena the documents onto Penta. Accordingly, defendant's argument is meritless.

III. CONCLUSION

After a de novo review of each of the defendant's objections to the Magistrate's Report and Recommendation, the Court OVERRULES each of the objections and ADOPTS the Magistrate's Report and

Recommendation in its entirety.

Defendant's motion to suppress is DENIED.

It is So Ordered.

/s/ Frank H. Freedman
Chief United States
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. CRIMINAL
NO. 88-0038-S

FRANCIS A. CONNOR, JR.,
RONALD J. MARINO,
MICHAEL J. DINEEN,
PAUL BLEICHERT and
RICHARD M. PENTA

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION TO DISMISS
and THE GOVERNMENT'S MOTION
FOR A CONTINUANCE

June 7, 1989

SKINNER, D.J.

A. Motion To Dismiss

The defendants have filed a joint motion to dismiss for non-compliance with the Speedy Trial Act, 18 U.S.C. §3261, et seq. They assert that there are 207 unexcludable days since the arraignment of the defendants. Defendants fail to consider that the first appearance of the defendant Dineen on August 8, 1988,

a co-defendant who has not been severed, starts the clock running anew. They also overlook the pendency of various motions.

The government claims that all the time intervening between the arraignment of the four other defendants and the present time is excludable. The government's theory is that it made a request for discovery on March 15, 1988 to which the defendants have not yet repled. The pendency of this request is said to be excludable under United States v. Jorge, 865 F.2d 6 (1st Cir. 1969). In my opinion the Court of Appeals did not intend a request for discovery to be an open-ended subversion of the Speedy Trial Act either at the hands of the defendants by failing to respond, or at the hands of the government by its failure timely to

compel a response. The Automatic Discovery order, Local Rule 42, requires a response within 14 days after arraignment. This is an appropriate period for the response to the government's request. Upon the defendants' failure to respond, the government was obliged to take some action to compel a response in order to stop the running of the Act's time limits. Accordingly, only 14 days is excludable on this theory, and, except in the case of Dineen, they occurred before August 8, 1988, and they are, accordingly, of no consequence in the calculation of excludable time.

Examination of the docket shows that there was some proceeding pending continuously from August 8, 1988 to February 4, 1989. This is substantially

conceded by the defendants, with the following exceptions:

1. Government's failure to file a timely memorandum in support of its motion for reconsideration from October 28 to November 23, 1988 (26 days).

2. Three days from December 25 to December 28, 1988, which exceeded the thirty days during which the court is permitted to have the government's motion for reconsideration under advisement.

3. The period between the court's order of remand to the magistrate, December 28, 1988 and the magistrate's final order, January 20, 1989 (23 days).

It appears from the record, however, that the court granted the government extensions of time to file its memorandum, notwithstanding the strictures of Local Rule 17(A) United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982). During the three days from December 25 through 28, 1988, there were also pending the

objections of the defendant Penta to the magistrate's order on his motion to suppress. The court's order on reconsideration was due on February 6, 1989, thirty days after the government's response (February 6 having been a Saturday), but was not entered until February 9, 1989.

The days following February 6, 1989 are not excludable until the next motion was filed on March 15, 1989 (37 days). On March 15, Bleichert's attorney filed a motion to withdraw which was not determined until April 12, 1989.

On April 12, 1989, defendant Connor filed a motion to dismiss in another case but by error included the docket number of this case on it. It was never docketed in this case. The government believed it was

filed in this case, but did not respond. I do not consider this motion to have been filed in this case and do not assign any excludable time to it.

One day is excludable for the Pre-Trial Conference. The period from Chief Judge Freedman's transfer order of April 25 until reassignment to me on May 8 is also excludable. 18 U.S.C. 3161(h)(1)(G). The remaining 11 days between April 12 and May 8 are not excludable. On May 8, the government filed a motion to continue which had remained under advisement up to this date.

Accordingly, there are only 48 days of non-excludable time out of the 70 days permitted under the Speedy Trial Act. The motion to dismiss is, accordingly, DENIED.

B. Motion To Continue

The government has moved to continue this case until August 5, 1989 on the ground that it is complex. The government has had well over a year to master its complexities. The government legitimately seeks three weeks of lead time because some of its essential witnesses are in prison and unavailable. I gave telephone notice on June 5 to the government that I would set the case for trial. Trial shall commence on June 26, 1989. The time between now and then is excludable under 18 U.S.C. 3161(h)(2).

A pre-trial conference will be held on June 7, 1989.

/s/ Walter Jay Skinner
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 89-1919

UNITED STATES,
Appellee,

v.

RICHARD M. PENTA,
Defendant, Appellant.

Before

Breyer, Chief Judge,

Aldrich, Senior Circuit Judge,

and Cyr, Circuit Judge.

ORDER OF COURT

Entered: April 11, 1990

Upon consideration of appellant's petition for rehearing,

It is ordered that said petition be, and the same hereby is, denied.

By the Court:

/s/ Francis P.Scigliano

Clerk.